PERWIRA AFFIN BANK BHD

v.

TAN AH TONG; GOON GOOI CHENG & ORS (INTERVENERS)

HIGH COURT MALAYA, KUALA LUMPUR
RK NATHAN J
[APPLICATION FOR EXECUTION NO: 38-117-89]
6 SEPTEMBER 2000

CIVIL PROCEDURE: *Injunction - Interim injunction - Interim injunction to restrain order for sale of land by public auction - Res judicata - Whether matters raised herein should have been raised in earlier proceedings - Whether court could restrain its own order for sale - Whether exception applied*

This was an application by the defendant for an interim injunction to stop the sale by public auction of a certain piece of land. The plaintiff raised two objections, *ie,* that this court should not grant an injunction to restrain its own order for sale, and that *res judicata* was applicable as the matters raised herein should have been raised in the foreclosure proceedings.

The defendant claimed that the order for sale of the subject land was made in respect of a property which title was no longer in existence as the original title had already been surrendered to the land office for sub-division purposes. As such, there was no question of *res judicata* applying to this case. The defendant also urged this court to follow the guidelines set by the Federal Court in *Badiaddin bin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd*.

Held:

[1] There was a clear reference on record of the new and the old titles. As such, *res judicata* was applicable.

[2] In *Badiaddin bin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd*, whilst it is settled law that one High Court cannot set aside a final order regularly obtained from another High Court of concurrent jurisdiction, the one special exception to this rule is where the final order of the High Court could be proved to be null and void on the ground of illegality or lack of jurisdiction. The defendant failed to establish this exception.

[Application dismissed.]

Case(s) referred to:

Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd [1998] 2 CLJ 75 ***(refd)***

Overseas-Chinese Banking Corpn Ltd v. Sindoma Realty Sdn Bhd & Other Applications [1989] 1 MLJ 377 ***(refd)***

For the appellant/defendant - YN Ngeow; M/s Loke & Assoc
For the respondent/plaintiff - Leong Wai Hong (Elaine Yap with him); M/s Skrine

Reported by Usha Thiagarajah

JUDGMENT

RK Nathan J:

The Application

This is an application by the defendant for an interim injunction to stop the sale by public auction of land held under HS(D)16193-16225 for Lot Nos. 4235-4267 and HS(D)16226 for Lot No. 4268 which was to be held on 3 July 2000 pursuant to an order of court dated 26 May 2000. At the commencement of the hearing of the application counsel for the respondent/ plaintiff raised two preliminary objections having given earlier notice of same to the applicant/defendant who indicated that he was ready to respond.

Findings Of The Court

As the first preliminary objection, Mr. Leong for the respondent argued that this court ought not to grant an injunction to restrain its own order for sale. It was pointed out that the initial order for sale was made on 5 September 1998 and that since there were no bidders there were numerous attempts at sale culminating in the last order of this court made on 26 Mei 2000 fixing the auction date to 3 July 2000. In *Overseas-Chinese Banking Corpn Ltd v. Sindoma Realty Sdn Bhd & Other Applications* [1989] 1 MLJ 377 Abu Mansor J (as his Lordship then was) when considering a case on almost similar issues held at p. 381 as follows:

> The injunction to my mind cannot also be granted for another very good reason. I agree with the submission of counsel for the chargee that there is no jurisdiction of this court to restrain the order of another High Court of co-ordinate jurisdiction (see *Bina Satu Sdn Bhd v. Tan Construction* ([1988] 1 MLJ 533)).

His Lordship went on further to hold in the next paragraph as follows:

> Even if the court could give the order to restrain, the court concludes that this matter is *res judicata* in the broad sense as the matters raised could have been raised in the foreclosure proceedings. I find the authority in *Yat Tung*

Investment Co Ltd v. Dao Heng Bank Ltd & Anor ([1975] AC 581) binding on this court where it was held that matters which could have been raised earlier should have been raised in the earlier proceeding and to raise again here is an abuse of the process of the court.

In respect of the issue of *res judicata* Mr. Ngeow for the appellant argued that the order for sale made on 26 May 2000 was made in respect of a property whose title is no longer in existence because the said original title had already been surrendered to the land office for sub-division purposes. He referred me to the original order for sale which referred to the original title held under Grant No. 7188 for Lot No. 94 Mukim of Ulu Kelang, Negeri Selangor (the original title), as being the subject matter of the order for sale. Even the proclamation of sale to be held on 25 November 1988 referred to the original title although the lot numbers referred to in the latest order for sale were also referred to in the first proclamation of sale to be held on 25 November 1988. It was the contention of Mr. Ngeow that since there has been no entry anywhere so far that the main title had been sub-divided into the 34 sub-titles, which are the subject matters of the later order for sale, there was therefore no question of *res judicata* applying in this case.

It is surprising that counsel can take such a stand when the defendant himself had affirmed an affidavit (encl. 15) where he admitted in para. 4 to that fact. Further the proclamation of sale to be held on 23 February 2000 clearly stated that the original title No. 7188 Lot No. 94 had been sub-divided and the present sub-divided lots with their titles have been individually stated. There is no question of the defendant not knowing of the sub-division and there is clear reference on record of the new and the old titles. To nail the case against the defendant the plaintiff referred me to an order of this court dated 21 December 1999 where *inter alia* the said order reads as follows:

> … ADALAH DIPERINTAHKAN bahawa penjualan keseluruhan tanah melalui lelongan awam yang dipegang di bawah HS(D) 16193 - 16225 untuk Lot 4235 - 4267 dan HS(D) 16226 untuk PT 2324 Lot 4268 (dahulunya dikenali sebagai Geran No. 7188 untuk Lot No. 94, Mukim Ulu Kelang, Negeri Selangor ("tanah tersebut") ditetapkan pada 23 haribulan Februari, 2000 jam 9.30 pagi di bilik lelong Mahkamah Tinggi Kuala Lumpur …

To my question as to whether the applicant/defendant had appealed against that decision Mr. Ngeow confirmed that his client had not done so. In the circumstances, I am constrained to hold that both the preliminary objections raised by the plaintiff are founded on solid principles. Mr. Ngeow referred me to *Badiaddin bin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd* [1998] 2 CLJ 75 and urged me to follow the guideline set by the Federal Court that whilst it is settled law that one High Court cannot set aside a final order

regularly obtained from another High Court of concurrent jurisdiction, the one special exception to this rule is where the final judgment of the High Court could be proved to be null and void on ground of illegality or lack of jurisdiction. Unfortunately, Mr. Ngeow had failed to establish this exception. On the contrary he has fallen into the same error which the Federal Court was quick to point out, happened to the court below in *Badiaddin*, when the said court failed to appreciate the central argument on the availability of the inherent jurisdiction of the High Court to exercise its discretion to set aside what was obviously an illegal attempt by the respondent to subvert and to effectively reverse the original final and perfectly legitimate order as a special exception to the doctrine governing the finality of court orders notwithstanding the absence of any appeal. I therefore dismissed the application with costs.